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No. 05-1350

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SUPREME COURT, U.S.

In The

Supreme Court of the United States

NEVA MURRAY, Individually and
as Guardian of Hugh Murray, Ward,

Petitioner,

v.

CROSSMARK SALES, INC.; CONNECTICUT GENERAL LIFE INSURANCE CO.; and GROUP & PENSION ADMINISTRATORS, INC.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

CONNECTICUT GENERAL LIFE INSURANCE COMPANY'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Should this Court accept Murray's invitation to review the Fifth Circuit's unpublished, per curiam opinion and judgment to reconsider its well-established precedent in *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989), upon which numerous employers have based the language of their employee welfare benefit plans with regard to the discretion granted to claims administrators over the last 17 years, based on an argument that was never raised before the district court or court of appeals, and in a case in which an unambiguous plan exclusion clearly precludes recovery?

2. Should this Court decide whether the doctrine of reasonable expectations applies in ERISA denial-of-benefits cases in this case, in which the court of appeals, in its unpublished decision, never wrote on that issue and where the prerequisites for application of the doctrine – an ambiguous or inconspicuous plan exclusion – are not present?

3. Should this Court accept review of a case in which two of the Respondents – Group & Pension Administrators and Connecticut General Life Insurance Company – cannot be held liable for benefits to Murray because they did not serve as plan administrator and were merely third-party claims administrators of Crossmark Sales, Inc.'s self-funded plan?

PARTIES TO THE PROCEEDINGS BELOW

Pursuant to SUP. CT. R. 24.1(b), Respondent Connecticut General Life Insurance Company identifies the following parties to the proceeding in the court whose judgment is under review:

A. Petitioner is Neva Murray, Individually and as Guardian of Hugh Murray, Ward.

B. Respondents are Connecticut General Life Insurance Company; Crossmark, Inc.; and Group & Pension Administrators, Inc.

CORPORATE DISCLOSURE STATEMENT

Pursuant to SUP. CT. R. 29.6, Respondent Connecticut General Life Insurance Company identifies the following potentially interested parties who are related to it: CIGNA Corporation, which is a publicly held corporation, CIGNA Holdings, Inc., and Connecticut General Corporation.

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INTRODUCTION

Petitioner Neva Murray was a participant in Respondent Crossmark Sales, Inc.'s ("Crossmark") employee welfare benefit plan, which, since 1997, has contained an exclusion for work-related injuries. Murray enrolled her husband in the plan as a dependent on March 29, 2000. Murray admits her husband was injured while on the job in February 2001 and that the plan contains an exclusion for work-related injuries. These facts are fatal to Murray's claim, and it was on this basis that Respondent Group & Pension Administrators ("GPA") and Respondent Connecticut General Life Insurance Company ("CGLIC"), the claims administrators for Crossmark's plan during the relevant time period, denied benefits.

Recognizing the effect of these undisputed facts, Murray turns to arguments not made to the court of appeals or the district court and based on purported facts not present in the appellate record. Murray argues that even if the plan document grants a claims administrator discretion, the abuse of discretion standard should not necessarily apply. Murray requests that this Court overturn its decision in *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989), 17 years after it was decided and during which time nearly every employer in the United States that offers benefits to its employees has followed the Court's direction in deciding the amount of discretion to confer to plan fiduciaries. Murray requests such relief for the first time in this Court, and she does so in the absence of any conflict among the circuits on this issue.

Murray also requests that the Court decide whether the doctrine of reasonable expectations applies in all ERISA denial-of-benefits cases. Lost in Murray's argument

is the fact that this issue was not discussed by the court of appeals in its opinion and judgment, which was not published. Thus, even if there were disagreement among the circuits, this case does not provide an appropriate platform for addressing any such conflict. In addition, the plan exclusion at issue was conspicuous and unambiguous. For the doctrine of reasonable expectations to apply in any circuit, a finding of either lack of conspicuousness or ambiguity is required. Thus, even if this case otherwise provided a vehicle for deciding whether the doctrine of reasonable expectation applies, the facts of the case do not lend themselves to full consideration of the issue.

For these reasons and those stated below, CGLIC respectfully submits that the Court should not grant Murray's petition.

STATEMENT OF THE CASE

I. Facts From the Appellate Record

Neva Murray is an employee of Crossmark and has participated in an employee welfare benefits plan offered by Crossmark, which includes medical benefits, since 1996. Pet.'s App. 2. The plan is self-funded. *Id.* The summary plan description ("SPD") and the plan document are contained in one document and control the terms of the plan. (Box of Exs.: Pl. Depo. Exs. 5, 8; Graham Depo. at 14-16, 57; Huth Depo. at 30).

Crossmark is the plan administrator, but it delegates claims administration to third-party claims administrators that have discretion and authority to make benefit determinations. Pet.'s App. 2. In 1997, GPA became the claims

administrator for the plan. CGLIC replaced GPA on March 1, 2001, and the SPD was amended in July 2001. *Id.*

Since at least 1997, the plan has excluded work-related injuries from coverage. The GPA SPD[1] provides an exclusion for

> Charges arising out of or in the course of any occupation for wage or profit, or for which the Covered Person is entitled to benefits under any Worker's Compensation or Occupational Disease Law, or any such similar law.

Pet.'s App. 3. Similarly, the CGLIC SPD provides:

> No payment will be made for expenses incurred for you or any one of your Dependents: for or in connection with an Injury arising out of, or in the course of, any employment for wage or profit.

Id.

On March 29, 2000, Neva Murray ("Murray" or "Mrs. Murray") enrolled her husband as a dependent beneficiary of the plan. Pet.'s App. 2. On February 12, 2001, Mr. Murray fell through an attic ceiling onto a concrete floor while performing his pest control job for profit. Pet.'s App. 3. Mr. Murray suffered severe head injuries, requiring extensive medical care.

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[1] The plan referred to in this brief is the Crossmark Medical Plan, which was provided for the benefit of Crossmark's employees. GPA acted as claims administrator for the plan until March 1, 2001 and was replaced by CGLIC. For ease of reference, the SPD under which GPA administered claims and which was in effect until July 2001 is referred to herein as the "GPA SPD." Thereafter, it is referred to herein as the "CGLIC SPD."

As part of GPA's investigation of the claims relating to this accident, it sent Mrs. Murray a request for information, to which she responded on May 29, 2001. Pet.'s App. 3. In her response, Mrs. Murray admitted her husband's injuries were work-related.

> Was the accident related in any way to your work? *Yes*
>
> If yes, please explain: *Was on job. . . . Self employed – Admiral Pest Control 7126 Eckhert Rd. Ste 211, San Antonio; 78238.*

Id.; (*see also* Box of Exs.: Pl. Depo. Ex. 1; Pl. Depo. at 18-19).

Based on this information, GPA determined that Mr. Murray's injuries were work-related and, therefore, excluded from coverage under the plan's work-related exclusion. Pet.'s App. 3. Crossmark then reviewed GPA's denial of Murray's claims and concurred that Mr. Murray's injuries were excluded because they were work-related. *Id.*

Unlike GPA, CGLIC utilizes what it calls a "pay and chase" system of claims administration. Pet.'s App. 4. Under this system, as a general rule, CGLIC initially pays claims that it receives, and then conducts an investigation to determine whether the claims are covered under the plan it is administering. Pet.'s App. 4. If a claim is ultimately denied, CGLIC seeks reimbursement on behalf of the plan for the benefits paid. (Box of Exs.: Graham Depo. at 96-97; Huth Aff. ¶ 3). Based on this system, CGLIC initially paid approximately $90,000.00 in benefits related

to Mr. Murray's injury. Pet.'s App. 4.[2] CGLIC employed Primax Recoveries Incorporated ("Primax") to investigate whether Mr. Murray's medical claims were covered by the plan. (Box of Exs.: Huth Depo. at 33-34; Pl. Depo. at 81; Pl. Depo. Exs. 16, 17). On June 21, 2001, Primax sent Mrs. Murray a request for information, and in August 2001, contacted her by telephone to determine whether her claims were covered by the Plan. (Box of Exs.: Pl. Depo. at 79-83; Pl. Depo. Exs. 16, 17). Mrs. Murray told Primax that Mr. Murray's injuries were work-related. (Box of Exs.: Pl. Depo. at 80-81).

Around this same time, Crossmark notified CGLIC that, based on Crossmark's review of the claims, it had learned that the claims were work-related. (Box of Exs: Graham Depo. at 99-100). When CGLIC discovered that Mrs. Murray admitted that Mr. Murray's injuries were work-related, it also began denying claims arising out of Mr. Murray's work-related injuries pursuant to the plan terms. (Box of Exs.: Pl. Depo. at 88-91, 97, 100-101; Pl. Depo. Exs. 18, 19, 20, 22, 35; Huth Depo. at 32; Huth Aff. ¶ 5).

Murray appealed GPA's and CGLIC's denial of her claims on the ground that Mr. Murray did not have workers' compensation insurance, but she failed to present GPA and CGLIC with evidence showing that Mr. Murray's injuries were not work-related, leading to affirmance of the previous claim denials. (Box of Exs.: Pl. Depo. at 104-107, 161-163, 173-176, 188, 190; Pl. Depo. Exs. 23, 35, 42,

[2] The district court referred to GPA as having made an initial payment of benefits to Murray. (Pet.'s App. 17 & Rec. 568-69). CGLIC, however, is the entity that originally paid Murray's claims until it realized they were work-related.

43, 45; Straughan Aff. ¶¶ 10, 11 and Exhibit 1 (CM 00392-429); Huth Aff. ¶¶ 6, 7 and Exhibit 1 (CGLIC 1977-2046)). Mrs. Murray then filed this suit.

Murray filed suit in the U.S. District Court for the Western District of Texas, San Antonio Division. The case was assigned to Honorable Edward C. Prado and then reassigned to Honorable Xavier Rodriguez. Because Appellees' denial of benefits to Murray based on the unambiguous language of the plan exclusions was neither arbitrary nor capricious, Crossmark and GPA filed a motion for summary judgment on February 24, 2004. Pet.'s App. 9. CGLIC filed a Motion for Leave to join Crossmark and GPA's motion for summary judgment, which was granted on July 2, 2004. *Id.* Murray filed a Motion for Partial Summary Judgment on February 27, 2004. *Id.*

On July 22, 2004, the district court denied Mrs. Murray's motion for partial summary judgment and granted a complete summary judgment for GPA and CGLIC. Pet.'s App. 9-22. The district court granted summary judgment to Crossmark on Murray's denial of benefits claim but found that Murray had raised a claim under 29 U.S.C. § 1132(c), and that fact issues existed with respect to that claim. *Id.* By stipulation, that claim was dismissed with prejudice on September 30, 2004, and it is not part of this appeal. Pet.'s App. 7. On October 4, 2004, the district court entered a final judgment. Pet.'s App. 7-8.

Murray then appealed the district court's judgment to the Fifth Circuit. The Fifth Circuit affirmed by an unpublished, per curiam opinion and judgment on January 23, 2006. (Pet.'s App. at 1-6).

II. Petitioner's Material Misrepresentations of the Appellate Record

Consistent with Rule 15.2 of this Court's Rules, CGLIC notes the following misrepresentations of the appellate record by Petitioner Murray. The judgment of the trial court and the court of appeals was based on cross-motions for summary judgment, and only those facts contained in the summary judgment record may be considered on appeal to this Court.

Murray states on page 3 of the Petition that "once CIGNA assumed administrative duties on March 1, 2001, it administered the Crossmark plan without benefit of any governing documents – whether SPD or plan – until July, 2001." This is a misstatement of the evidence in the record. As indicated above, the record indicates that CGLIC indeed became the claims administrator for the Crossmark plan on March 1, 2001, but there was no amendment of the plan that GPA had been administering at that time. Thus, CGLIC administered claims under the GPA SPD until the plan was amended in July 2001, at which time CGLIC used the CGLIC SPD – which contained a substantively identical work-related exclusion to the GPA SPD – in administering claims.

Page 5 of Murray's petition contains one of the grossest misstatements of the record contained in the petition. Murray indicates that "CIGNA, months after learning of Mr. Murray's extensive claims, drafted its plan, separated out the worker's compensation and work-related exclusions into two separate exclusions, and placed the work-related exclusion as the first-listed one." This statement is untrue and does not appear anywhere in the appellate record. In fact, CGLIC's SPD, which was an amendment to

the Crossmark Plan in July 2001, was drafted with no regard to Murray's claims and was a form used by CGLIC that contained the same work-related exclusion as the GPA SPD; the CGLIC SPD merely listed the exclusion separately rather than in a single paragraph with the workers' compensation exclusion like the GPA SPD. Murray grossly misstates the record in this regard and in fact bases a large portion of her petition on the purported fact that CGLIC used a backdated or post-hoc plan document to apply to her claim. This representation is untrue and is not in the appellate record.

Additionally, Page 6 of the Petition contains facts that are not found in the appellate record. Murray states, without support, that "Respondents indicated, in internal communications, that no administrator was to pay any benefits for Hugh Murray and instructed adjusters to deny all claims, in an apparent decision that all future health care needs by Mr. Murray related back to his accident. Claims for Mr. Murray's gastrointestinal and cardiac problems were thus denied." This purported representation of facts appears nowhere in the appellate record. In fact, Murray first attempted to make such a claim after the district court granted summary judgment to Respondents. The district court granted Crossmark's motion to strike this pleading (Rec. 638-640), and Murray did not appeal the district court's actions.

These misstatements by Petitioner should not be considered by this Court when deciding whether to grant Murray's petition.

REASONS FOR DENYING THE PETITION

Murray contends that the Court should grant review in this case consistent with concerns raised by Justice Ginsburg in her concurring opinion in *Aetna Health Inc. v. Davila*, 542 U.S. 200 (2004). Justice Ginsburg's opinion in *Davila*, however, has nothing to do with the facts or law presented in this case. Justice Ginsburg decried the preemptive effect of ERISA on potential state-law remedies and the resulting failure to provide a "make-whole standard of relief." *Id.* at 224.

Preemption is not an issue in this case, nor does this case involve an inability to be made whole under ERISA because of limitations within the statutory remedies provided by Congress. Rather, Murray had an opportunity to be made whole through ERISA-based remedies under Section 502(a); however, an exclusion existed under the plan's terms that clearly precluded her recovery.

Murray, however, ignores the concrete nature of the facts of this case and the applicable plan language in an attempt to entice the Court into accepting review of an unremarkable case decided in an unpublished Fifth Circuit opinion that affirmed an unpublished order of the district court, granting summary judgment for the Respondents.

I. The Court should not revisit its decision in *Firestone* because Petitioner has waived this argument and has shown no compelling reason for the Court to grant review.

Murray begins her argument by asking the Court to consider whether a claims administrator granted full discretion under an applicable plan document should

nevertheless have its benefit decisions under the plan reviewed *de novo* under factual circumstances Murray contends are present here. CGLIC respectfully submits that there is no compelling reason for the Court to accept review to decide this issue for several reasons. First, the facts Murray claims justify such a variance on the level of discretion granted by the plan are not present in the appellate record. Second, Murray never raised this argument in the courts below and should not be allowed to present this argument for the first time to this Court while attacking the judgment of the courts below. Finally, there is no split of authority among the circuits on this issue that necessitates resolution by this Court.

Murray first requests that the Court decide the question of "whether a backdated or post-hoc instrument may exclude claims for benefits under an ERISA welfare benefit plan, as Respondents have done here." (Pet. at 10). As detailed above, this issue, as presented, assumes facts that are not in the appellate record. Respondents applied no backdated or post-hoc plan document to Murray's claims. Instead, the GPA SPD, in effect at the time of Murray's enrollment in the plan and the time of Mr. Murray's injuries, was in effect until July 2001. GPA administered claims for the plan until March 2001, at which time CGLIC took over as claims administrator. Then, in July 2001, the plan was amended. Neither CGLIC nor GPA applied a backdated or post-hoc plan document to Murray's claims.

Murray also argues that given these purported facts, the Court should consider the question "whether the abuse of discretion review is appropriate under these circumstances." (Pet. at 10). Again, this question, as presented, assumes facts not in the appellate record, as indicated

above. Moreover, Murray never raised any argument concerning the appropriate standard of review in the district court or the court of appeals. In fact, in the district court, Murray filed a cross-motion for summary judgment in which she argued that Respondents abused their discretion in denying her claim. (Pet.'s App. 9 & Rec. 362). Thus, Murray assumed that the abuse of discretion standard applied and never argued that another standard should apply.

This Court has held that when a petitioner fails to raise an argument in the court below that attacks the judgment, the argument will not be considered. *U.S. v. United Foods, Inc.*, 533 U.S. 405, 416-17 (2001). In *United Foods*, the government attempted to raise an argument concerning the immunity of government speech from the normal amount of scrutiny applied. It was undisputed, however, that the government never raised this argument in the court of appeals. *Id.* at 416. The Court concluded that the government's failure to raise this point deprived respondent of the ability to address such matters. *Id.* at 416-17. The Court noted that although respondents are sometimes allowed to defend judgments on grounds other than those pressed in lower courts, it is a different matter when a petitioner attempts to present new substantive arguments attacking a judgment that were not raised in the court below. *Id.* at 417.

Likewise, the Court should not allow Murray to raise the issue of the propriety of the abuse of discretion standard of review in ERISA denial-of-benefit cases when she did not dispute that this standard of review applied when the case was before the district court and court of appeals. Murray never raised this argument until she sought review in this Court. Respondent CGLIC, therefore,

respectfully requests that the Court not accept review of Murray's argument concerning the propriety of the abuse of discretion standard as applied under the facts of this case.

However, even if this Court were to address Petitioner's argument, it has no merit. Murray alleges a litany of ideas for why Respondents should not have been afforded discretion in making the claims determination in this case. First, Murray argues that because Respondents allegedly failed to provide Murray with the applicable SPD, Respondents should not be entitled to review under an abuse of discretion standard. This argument ignores the facts of this case. Murray does not dispute that she enrolled in the Crossmark plan in 1996, well before Mr. Murray's accident. She had ample opportunity to review a copy of the plan, which included the worked-related exclusion at issue since 1997, well before Mr. Murray's injuries. Moreover, the SPD was available on-line at her work. Finally, even if one were to accept Murray's argument that she could not access the SPD on-line at work, there is no question that Crossmark provided her with a hard copy no later than August 2, 2001.

If there is any remedy for the conduct Murray alleges occurred – failure to timely provide a copy of the applicable SPD, which is disputed by Crossmark – then the remedy is penalties as provided in 29 U.S.C. § 1132(c), as the district court held here. Murray and Crossmark stipulated to dismissal of that issue. Pet.'s App. 7. Murray suggests, however, that actions taken by the plan administrator – Crossmark – in providing or not providing the SPD to participants in a timely manner should negatively affect the amount of discretion that the claims administrators – GPA and CGLIC – had in interpreting the plan and

assessing claims for benefits under it. There is no logical connection between the issue of whether the plan administrator provided a copy of the SPD to participants in a timely manner and whether the Plan confers discretion on claims administrators in making claims decisions under the plan. Murray's argument ignores the undisputed fact that there was a written SPD that excluded work-related injuries, and that this exclusion was applicable to Mr. Murray's injuries.

Apparently recognizing the deficiency of this argument, Murray then progresses to a confused argument that seems to incorrectly intertwine two unrelated concepts. First, Murray correctly points out that notice must be given to participants of the reason for the denial of a claim. (Pet. at 12). Murray appears to take this fact, however, and assume that the same standard applies to pleading plan exclusions under Rule 8 of the Federal Rules of Civil Procedure. *Id.* at 12-13. CGLIC is uncertain how these two separate requirements relate to the appropriate standard of review in an ERISA denial-of-benefits case, but it will address each and demonstrate how neither rule was violated here and why the facts of this case do not show the need for imposition of a *de novo* standard of review, as Murray argues.

First, Murray contends that Respondents failed to provide adequate notice of the reasons for their denial of Murray's claim such that she did not know that they would claim application of the work-related exclusion. This is not true. In fact, Respondents could not have been more explicit in denial letters sent to Murray well over a year before she filed the underlying suit. In early August 2001, GPA began issuing Explanation of Benefits ("EOBs")

to Murray denying all claims arising out of Mr. Murray's February 12, 2001 injury because:

> "CHARGES INCURRED AS A RESULT OF AN ON THE JOB INJURY OR ILLNESS ARE DENIED ACCORDING TO THE MAJOR MEDICAL EXCLUSIONS IN YOUR SUMMARY PLAN DESCRIPTION."

(Box of Exs.: Pl. Depo. at 97-100; Pl. Depo. Ex. 21; Straughan Depo. at 43-44; Straughan Aff. ¶ 9 and Exhibit 1 (GPA 00001, 18-38)). Likewise, in CGLIC's denial letters sent to Murray at the administrative level, the applicable exclusionary language was explicitly stated. For example, CGLIC's August 13, 2001 denial letter states:

> CIGNA should not have covered these charges due to the following exclusion listed under the General Limitations in your Summary Plan Description:
>
> > *No payment will be made when charges are received for or in connection with an injury arising out of, or in the course of, any employment for wage or profit.*

(Box of Exs.: Pl.'s Depo. Ex. 18 (emphasis in original)). Thus, Murray knew well before she ever filed suit that CGLIC was relying on the work-related exclusion in the plan.

In addition, because Mrs. Murray had the burden of proving that the administrators' decisions to deny the benefit claims was arbitrary and capricious, Respondents were not required to plead the exclusion as an affirmative defense. *See also* FED. R. CIV. P. 8(c). To require otherwise would effectively shift Murray's burden of proof to Respondents, which is contrary to ERISA jurisprudence.

Even assuming Murray is correct that the exclusion had to be pleaded specifically, to hold that CGLIC waived application of the exclusion at issue would ignore the purposes of the defensive pleadings rule and the facts of this case. The rule that failure to plead an affirmative defense results in waiver – Rule 8(c) – is not absolute. "Where the matter is raised in the trial court in a manner that does not result in unfair surprise, however, technical failure to comply precisely with Rule 8(c) is not fatal." *Allied Chem. Corp. v. Mackay*, 695 F.2d 854, 855-56 (5th Cir. 1983). The reason for the requirement of Rule 8 is to put plaintiff on notice of defenses well in advance of trial. If a defendant raises a defense at a pragmatically sufficient time and plaintiff is not prejudiced in putting on his or her case, then there is no waiver. *Id.* Federal courts that have confronted this issue have followed this reasoning. *Kleinknecht v. Gettysburg College*, 989 F.2d 1360 (3d Cir. 1993); *Moore, Owen, Thomas & Co. v. Coffey*, 992 F.2d 1439, 1445 (6th Cir. 1993); *Ball Corp. v. Xidex Corp.*, 967 F.2d 1440, 1444 (10th Cir. 1992); *Peterson v. Air Line Pilots Ass'n Int'l*, 759 F.2d 1161, 1164 (4th Cir.), *cert. denied*, 474 U.S. 946 (1985); *see also Johnson v. Cullen*, 925 F. Supp. 244, 247 n.2 (D. Del. 1996); *Vermont Mutual Ins. Co. v. Everette*, 875 F. Supp. 1181, 1189 n.3 (E.D. Va. 1995).

For example, in *Allied Chemical*, the Fifth Circuit noted that although not pleaded, the defense at issue was raised in the trial court's pretrial order. *Allied Chemical*, 695 F.2d at 856. Based on this fact, the Fifth Circuit concluded that the defendant did not "lie behind the log" and held that the defendant "raised the issue at a pragmatically sufficient time, and Allied was not prejudiced in its ability to respond. Construing the Rules to do substantial justice, we hold that the usury defense was not

waived." *Id.*; *see also Allianz Versicherungs, AG v. Prof-reight Brokers, Inc.*, 99 Fed. Appx. 10, 12 (5th Cir. 2004) (concluding that party suffered no prejudice when limitations defense was raised in pre-trial order, three months prior to trial). In another case, the Fifth Circuit considered the fact that the plaintiff had raised an exclusion in its complaint and had discussed the exclusion in its trial memorandum in concluding that the plaintiff "plainly was not a victim of unfair surprise" and that the exclusion at issue had not been waived. *Bull's Corner Restaurant, Inc. v. Director of Federal Emergency Management Agency*, 759 F.2d 500, 502 (5th Cir. 1985).

As detailed above, Murray has suffered no surprise from Respondents' reliance on the work-related exclusion. The exclusion was prominently detailed in the denial letters Respondents sent to Murray well over a year before she filed suit. In addition, in August 2001, Crossmark participated in a conference call with Murray, in which its representatives explained the application of the exclusion to Murray. (Box of Exs.: Graham Aff. ¶ 6).

Also, CGLIC and the other Respondents put Murray on notice that this exclusion was the basis for their denial of Murray's claim during the course of the underlying litigation. CGLIC pleaded the applicability of ERISA to this action, which Murray does not dispute. Pet.'s App. 5. Moreover, CGLIC pleaded that Murray's claims were not covered under the plan. *Id.* In addition, in Crossmark and GPA's Motion to Limit Discovery, filed on June 11, 2003, they asserted the work-related exclusion. *Id.* In fact, Murray herself raised the exclusion in her July 2, 2003 response to the Motion to Limit Discovery. (Rec. 141-42). Respondents again raised the exclusion in their Motion to Strike Plaintiff's Designation of Fact and Expert Witnesses on October

3, 2002. (Rec. 267-68). Again, Murray herself noted this reliance on the exclusion in her response to the motion. (Rec. 278, 281). The trial court's February 5, 2004 order cited the exclusion as the basis for Respondents' denial of Murray's claim. (Rec. 331). Murray also took the deposition of CGLIC's corporate representative, Cynthia Huth, in which Ms. Huth stated explicitly that the sole basis for denial of Murray's claims was the applicability of the exclusion in the GPA and CGLIC Plans. (Box of Exs.: Huth Depo. at 32-34). Witnesses from GPA and Crossmark testified likewise. (Box of Exs.: Graham Depo. at 81-82).

In other words, Murray had fair notice that CGLIC, GPA, and Crossmark would argue the applicability of the work-related exclusion to this case. To claim surprise such that a different standard of review should apply to the claim decisions in this case completely ignores the facts in the appellate record. Murray clearly knew that Respondents would allege the applicability of the exclusion – otherwise, Murray would not have known to raise waiver of the exclusions preemptively in her own Motion for Partial Summary Judgment. (Rec. 362-76).

In sum, Murray does not present the type of facts that should lead this Court to depart from its previous decision in *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989), that if a plan conveys discretion on an administrator, then it should be allowed such discretion rather than have its decisions reviewed *de novo*. There is no split of authority among the circuits on this issue and no compelling reasons to justify accepting review of the Fifth Circuit's unpublished, per curiam opinion.

II. This is not an appropriate case for deciding whether the doctrine of reasonable expectations should apply in all ERISA denial-of-benefits cases.

Murray's second primary argument is that the Court should accept review of this case to resolve a conflict among the circuits on whether to adopt the doctrine of "reasonable expectations" in ERISA denial-of-benefits cases. This case, however, is not an appropriate one for resolving this conflict, assuming one exists. The Fifth Circuit did not discuss or even mention the reasonable expectations doctrine in its opinion. In addition, the Fifth Circuit's opinion was unpublished. Only the district court's order made any mention of the reasonable expectations doctrine, and, although the court rejected application of this doctrine, its opinion was unpublished, as well. Thus, even if the Court wished to decide whether the reasonable expectations doctrine has any place in the review of ERISA denial-of-benefits cases, this case would not be the appropriate platform from which to render such a decision.

Moreover, the facts of this case do not lend themselves to resolving this issue. As indicated in Murray's petition, the reasonable expectations doctrine has been applied in two primary circumstances by some circuits – when plan language is ambiguous and when a plan exclusion is not clear and conspicuous. (Pet. at 13-14). Neither circumstance is present here.

As held by the court of appeals, neither the GPA SPD nor the CGLIC SPD is ambiguous. (Pet.'s App. at 5). They clearly exclude benefits for any person who is injured while on the job. The only difference between the GPA and CGLIC SPDs is that while the CGLIC SPD separates the work-related exclusion from the workers' compensation

exclusion, the GPA SPD puts the two exclusions into one clause, separated by the word "or." This fact does not make the GPA SPD ambiguous. The word "or" is plainly disjunctive. There is nothing ambiguous about the language used.[3] Therefore, there is no basis to look beyond the plain language of the SPDs at issue because the exclusions are not ambiguous.

Tellingly, Murray does not even argue that the language of the CGLIC SPD is ambiguous where the exclusion's language is concerned. Instead, she argues that the exclusion became ambiguous in operation because Mr. Murray's injuries became a "pre-existing condition" once the CGLIC SPD was put in place. (Pet. at 15). This argument does not demonstrate an ambiguity that should be read against CGLIC. Murray's "pre-existing condition" argument is not only nonsensical, it has been waived. Murray never raised this issue at the administrative level or in the trial court; as a result, this argument cannot be properly raised for the first time on appeal. *United Foods*, 533 U.S. at 416-17, 121 S.Ct. at 2341; *Vogel v. Veneman*, 276 F.3d 729, 733 (5th Cir. 2002); *Stephens v. C.I.T. Group/Equipment Financing, Inc.*, 955 F.2d 1023, 1026 (5th Cir. 1992).

Moreover, even had this argument not been waived, it makes no sense. The CGLIC SPD does not even mention

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[3] *See Marquette General Hosp. v. Goodman Forest Indus.*, 315 F.3d 629 (6th Cir. 2003) ("The exclusion is written in the disjunctive; one exclusion does not depend on the other, nor does one determine the other. Contrary to Plaintiffs' assertion, the word or does not also mean and. Any other reading constrains the clear meaning of the language. As this court has previously held, ERISA plans should be interpreted "according to their plain meaning, in an ordinary and popular sense.").

pre-existing conditions. Murray argued to the Fifth Circuit, however, that "Since the CIGNA plan unquestionably provides coverage for preexisting conditions, Mrs. Murray reasonably expected her claim to be paid." (Brief of Appellant at 17). She then referenced a letter from Crossmark indicating to employees that "pre-existing limitations" were removed when the CGLIC SPD came into effect. *Id.* In essence, Murray appears to argue that because the GPA SPD contained a pre-existing condition limitation and the CGLIC SPD did not, then any condition not already existing at the time of the transition from the GPA SPD to the CGLIC SPD would be covered under the CGLIC SPD.

In addition to lacking logic, this argument ignores the basic fact that, even in the absence of an exclusion for pre-existing conditions, the CGLIC SPD still contained applicable exclusions, as did the GPA SPD, one of which squarely applied to Murray's claim. The issue of pre-existing conditions is really a non-issue and is a red herring that Murray failed to raise in the district court.

Murray's other argument for imposition of the reasonable expectations doctrine in this case is that the exclusion at issue was not conspicuous in the CGLIC SPD. The genesis of Murray's argument comes from a Ninth Circuit case, *Salterelli v. Bob Baker Group Medical Trust*, 35 F.3d 382, 387 (9th Cir. 1994). In *Salterelli*, the exclusion on which the defendant relied to deny coverage to the plaintiff was not contained with the other exclusions in the plan document. *Id.* at 385. Instead, it was contained in the "Definitions" section, and three definitions had to be read in conjunction to figure out the scope of the exclusion. *Id.* Based on these facts, the Ninth Circuit decided, as an issue of "first impression," whether the doctrine of reasonable expectations, which applied to insurance contracts

under California law, should be applied in an ERISA case. *Id.* at 386-87. The court concluded that under the circumstances of that case, this doctrine should apply absent a plain, conspicuous statement of the exclusion in the plan document. *Id.* at 387.

As recognized by the district court in this case, the facts of *Salterelli* are not even close to the facts of this case. In *Salterelli*, the exclusion at issue was buried in the definitions section of the plan – and was not even clear among the definitions – rather than appearing with the rest of the plan's exclusions. That is not the case here. CGLIC's exclusions were not hidden at all. The exclusion at issue in the CGLIC SPD was the first exclusion, plainly listed under the heading **"GENERAL LIMITATIONS, MEDICAL AND VISION CARE BENEFITS"**. (Box of Exs.: Pl. Depo. Ex. 8 at 54). There was no hiding of this exclusion among other policy provisions.

Murray suggests that CGLIC hid its exclusions by calling them "General Limitations" and because the page reference to them is incorrect in the SPD's Table of Contents. (Pet. at 5). The SPD's Table of Contents lists General Limitations as appearing on Page 53. Instead, they are listed on Page 54. This typographical error did not mislead Plaintiffs or hide the applicable exclusion. It is plainly listed as the first exclusion on the next page. Moreover, the term "General Limitations" is not misleading in any way; it accurately describes the plan's exclusions. These facts do not even approach the type of facts contained in *Salterelli*. The exclusionary language of the plans is plain and unambiguous, and it was not hidden.

Moreover, Murray had no reason to believe that Mr. Murray's injuries were covered under these circumstances.

The work-related exclusion had been in place since 1997. Pet.'s App. 15. And, Murray is not arguing that coverage that once existed was taken away. The exclusion at issue was always applicable, and CGLIC began denying coverage as soon as facts were revealed that indicated the exclusion was applicable. Pet.'s App. 4.

For these reasons, the "doctrine of reasonable expectations" does not apply here, even if it were accepted as the law, making this case an inappropriate vehicle to decide whether this doctrine should be the rule of law in all circuits.

III. CGLIC cannot be liable for payment of benefits under the plan.

Finally, even assuming for the sake of argument that Murray's arguments are correct, CGLIC can have no liability to Murray on her claim for recovery of benefits under the plan. Murray appears to believe that CGLIC is an insurer that has somehow provided insurance benefits under the plan. The plan explicitly states otherwise. On page 9 of the CGLIC SPD, under the heading **"IMPORTANT INFORMATION"**, it is explained to participants that:

> This is not an insured benefit plan. The benefits described in this booklet or any rider attached hereto are **self-insured by CROSSMARK, Inc.** which is responsible for their payment. Connecticut General provides claim administration services to the plan, but Connecticut General does not insure the benefits described.

(Box of Exs.: Pl.'s Depo. Ex. 8 at 9 (CM 00087) (emphasis in original)).

CGLIC was not the administrator of the plan, nor was it the plan's insurer. CGLIC was not the plan administrator under either plan. Crossmark was and is the only plan administrator of the plan, which is self-funded by Crossmark. (Box of Exs.: Graham Depo. at 13; Pl. Depo. at 212; Pl. Depo. Ex. 5 at 3, 5, 7-16, 21-26, 30-39; Pl. Depo. Ex. 8 at 9, 10-25, 35-44, 49-53, 75, 78). The GPA SPD states, on page 1, that

> [i]t is the intention of the Plan Administrator, CROSSMARK, Inc., to hereby establish a program of benefits constituting a self-funded 'Employee Welfare Benefit Plan' under the Employee Retirement Income Security Act of 1974 (ERISA) and any amendments thereto.

(Box of Exs.: Pl.'s Depo. Ex. 5 at 1 (CM 00007)). Although the CGLIC SPD does not explicitly state what party is the plan administrator, ERISA provides that if a plan does not explicitly designate the party that acts as plan administrator, it is assumed to be the employer, which is Crossmark in this case. *See* 29 U.S.C. § 1002(16)(A)(ii); (B)(i). CGLIC was merely a third-party claims administrator with which Crossmark contracted to assist it in administering benefits to employees. All payments made under the plan were made from Crossmark funds, not CGLIC's, (Box of Exs.: Pl.'s Depo. Ex. 8 at 9 (CM 00087)), and CGLIC was not the plan administrator as that term is used under ERISA.

The Second Circuit has encountered this very situation, in a case filed against CGLIC under ERISA. *Lee v. Burkhart*, 991 F.2d 1004, 1006 (2d Cir. 1993). In *Lee*, the employer that provided a self-funded benefits plan went bankrupt, leaving claims unpaid. *Id.* The participants then sued CGLIC, which they believed to be the insurer of the

plan. *Id.* Under these facts, the court held that CGLIC had no liability under ERISA for benefits or for failure to provide information because only the plan and its administrator could be liable for such claims under the plan's terms. *Id.* at 1009-10.

Other federal courts have held likewise under similar circumstances. *See, e.g., Everhart v. Allmerica Financial Life Ins. Co.*, 275 F.3d 751, 754 (9th Cir. 2001), *cert. denied*, 122 S.Ct. 2662 (2002) (holding claims for benefits can be only against plan); *Layes v. Mead Corp.*, 132 F.3d 1246, 1249 (8th Cir. 1998) (permitting suit against plan administrator but not employer); *Garren v. John Hancock Mut. Life Ins. Co.*, 114 F.3d 186, 187 (11th Cir. 1997) (holding that outside insurance company that serviced plan was not proper defendant because was not plan administrator); *Jass v. Prudential Healthcare Plan, Inc.*, 88 F.3d 1482, 1490 (7th Cir. 1996) ("ERISA permits suits to recover benefits only against the Plan as an entity. . . ."); *Lee*, 991 F.2d at 1009 (same); *Daniel v. Eaton Corp.*, 839 F.2d 263, 266 (6th Cir.), *cert. denied*, 109 S.Ct. 76 (1988) (holding that only proper party in suit for benefits under ERISA plan is party in control of plan administration); *Blum v. Spectrum Restaurant Group, Inc. a/k/a NBACO, Inc.*, 261 F. Supp.2d 697, 709 (E.D. Tex. 2003) (holding that only plan is proper party); *Murphy v. Wal-Mart Assocs.' Group Health Plan*, 928 F. Supp. 700 (E.D. Tex. 1996) (allowing no action against claims administrator for recovery of benefits under section 1132(a)(1)(B)); *Holloway v. HECI Exploration Co. Employees' Profit Sharing Plan*, 76 B.R. 563, 570 (N.D. Tex. 1987), *aff'd, Matter of HECI Exploration Co. Inc.*, 862 F.2d 513 (5th Cir. 1988) (citing and agreeing with Ninth Circuit). CGLIC is unaware of any conflict on this issue among the circuits.

The plan at issue was self-funded by Crossmark. (Box of Exs.: Graham Depo. at 13; Pl. Depo. at 212; Pl. Depo. Ex. 5 at 3, 5, 7-16, 21-26, 30-39; Pl. Depo. Ex. 8 at 9, 10-25, 35-44, 49-53, 75, 78). Crossmark paid claims under the plan out of its own funds. CGLIC merely assisted Crossmark with claims administration; it was not the plan administrator. As a result, CGLIC cannot be liable to Murray for benefits under the plan.

This fact is yet another reason why Murray's petition should be denied. Many of the arguments she makes seek to impose liability on the claims administrators, GPA and CGLIC, as if the plan were fully insured by them. The plan is self-funded by Crossmark, making Murray's claim for benefits against CGLIC and GPA of no effect. Like many other facts in the appellate record, Murray omits this one, which is fatal to many of her claims.

CONCLUSION

This case does not present a record upon which this Court should grant review. Murray misstates the factual record throughout her petition and makes many arguments that were not properly preserved in the courts below. In addition, she seeks review of an unpublished decision from the Fifth Circuit, affirming an unpublished decision of the district court. This case does not further divide the circuits on any issue presented, particularly since the court of appeals did not even write on the reasonable expectations issue. As a result, CGLIC respectfully

requests that the Court deny Murray's Petition for Writ of Certiorari.

Respectfully submitted,

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